RECORD AND BRIEFS

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No. 15-1031

IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

PETITIONER'S REPLY BRIEF

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This case presents a scenario that has now arisen in ten different state supreme courts. The divorce decree of Sandra and John Howell awarded a fixed percentage of John's military retirement pay (MRP) to Sandra. After the divorce, John waived a portion of his MRP in order to receive disability pay, causing Sandra's monthly payments to decrease. The divorce court ordered John to reimburse Sandra for the portion of the MRP that he waived. On appeal, John argued that the divorce court's order was preempted by the federal Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, which prohibits the division of disability pay in a divorce decree. *See Mansell v. Mansell*, 490 U.S. 581 (1989).

The Arizona Supreme Court rejected John's federal preemption argument. But, echoing the observation of numerous other courts, it recognized that "[c]ourts in other jurisdictions have divided on the issue." Pet. App. 6a. Indeed, on identical facts, four other state supreme courts have that federal law does not preempt such an order, and five state supreme courts have held that federal law does preempt such an order. Respondent's arguments that the conflicting cases can be reconciled are incorrect. The Court should grant certiorari to resolve the conflict.

On the merits, the decision below is wrong. The order upheld by the decision below is substantively identical to the order that this Court held was preempted in *Mansell*. The Arizona Supreme Court, echoed by Respondent, attempted to distinguish *Mansell* on the ground that that the divorce court's order did not *directly* award Respondent half of

Petitioner's disability pay, but instead required Petitioner to pay a sum *identical to* half of his disability pay. But that reasoning is both economically untenable and irreconcilable with this Court's precedents. The decision below violates federal law and should be reversed.

I. The Decision Below Conflicts With Decisions With Five Other State Supreme Courts.

The decision below is consistent with decisions from the highest courts of Maine, Tennessee, Massachusetts, and Rhode Island. Pet. 11-16. But it conflicts with decisions from the highest courts of Vermont, Mississippi, Alabama, Alaska, and Nebraska. Pet. 16-25. As shown below, the facts and procedural posture of the latter set of cases were identical to the facts and procedural posture here, yet those courts held that federal preemption applied. Respondent's efforts to reconcile the conflicting cases are not successful.

1. *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010). The divorce decree of Elisabeth and Bruce Youngbluth specified that Elisabeth would receive a fixed percentage of Bruce's MRP. Pet. 17-18. After Bruce waived a portion of his MRP to receive disability benefits, Elisabeth sought to modify the decree to receive the same monthly payments she was previously getting. *Id.* The trial court granted Elisabeth's request, and the Vermont Supreme Court reversed. After acknowledging that "[s]tate courts are split on this issue" without any "clear majority viewpoint," 6 A.3d at 684, 687, the Vermont Supreme Court held that federal law preempted such a modification to the

decree—in direct conflict with the decision below. Pet. 17-18.

Respondent asserts that *Youngbluth* "rests primarily on the interpretation of its property division order and state law regarding the finality of such orders." BIO 8. This is not credible. The *Youngbluth* court made explicitly clear that its decision was based on federal law: "[A] decision by the United States Supreme Court on a matter of *federal law* is binding upon the state courts," and "*federal law* is very clear that the former spouse has no right to those amounts of retirement benefits which the former military servicemember waived so he could receive disability benefits." *Youngbluth*, 6 A.3d at 685, 690 (internal quotation marks and alterations omitted; emphasis added).

Respondent also asserts: "Noteworthy also is that there was no property settlement agreement in *Youngbluth*, the opinion did not discuss whether wife had a vested interest in husband's MRP, and it took no position on indemnification for waived MRP." BIO 10. Taking those statements one by one:

- "*There was no property settlement agreement in Youngbluth.*" Respondent does not explain why this was "noteworthy." Moreover, there apparently *was* a property settlement in *Youngbluth*. 6 A.3d at 691 (Johnson, J., concurring) ("These retirement benefits were treated as marital property for purposes of the divorce settlement").

- *"The opinion did not discuss whether wife had a vested interest in husband's MRP."* Respondent seems to be referring to the Arizona Supreme Court's *state law* analysis, in which it characterized Respondent as holding "vested property rights." Pet. App. 8a-14a. This characterization played no role whatsoever in the court's *federal law* analysis. Pet. App. 5a-8a. And for good reason: "vested property rights" could not possibly affect the federal preemption analysis. Federal law preempts conflicting state law; thus, if federal law prohibited the modification of the decree, then the characterization of Sandra's interests for state-law purposes could not possibly change that result. Neither the court below, nor any other court that has considered this issue, has ever suggested that a state-law "vested property rights" doctrine could affect federal preemption.

- *"It took no position on indemnification for waived MRP."* This is simply wrong. In *Youngbluth*, the trial court increased Bruce's monthly payments by an amount "equat[ing] to the ... monthly payment that the trial court had in mind when it decided the initial allocation." 6 A.3d at 680. That is *identical* to what the trial court did here. Pet. App. 4a (trial court's order directed that John be "responsible for ensuring Sandra receives her full 50% of the military retirement

without regard for the disability" (alterations omitted)). There is simply no way to reconcile *Youngbluth* with this case.[1]

2. *Mallard v. Burkart*, 95 So. 3d 1264 (Miss. 2012). The divorce decree of Tonya Burkart and James Mallard specified that Burkart would receive a fixed percentage of Mallard's MRP. Pet. 18-20. After Mallard waived a portion of his MRP to receive disability benefits, Burkart sought to modify the decree to receive the same monthly payments she was previously getting. *Id.* The trial court granted Burkart's request, and the Mississippi Supreme Court reversed. Observing that "[t]here is a split of authority on this question, and no clear majority view," 95 So. 3d at 1271, the court held that federal law prohibited the modification: "state law is preempted by federal law, and thus, state courts are precluded from ordering distribution of military disability benefits contrary to federal law." *Id.* at 1272.

Respondent avers: "Because the case does not discuss the propriety of an indemnification order, it does not conflict." BIO 10. This is inexplicable. The divorce court concluded that "Burkart's interest in Mallard's total retirement pay, including his disability benefits, had vested at the time of the entry of the final

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[1] If Respondent is making an inartful reference to the Vermont Supreme Court's observation that the divorce *decree* contained no indemnification provision, 6 A.3d at 689, that would not resolve the conflict, because the Arizona Supreme Court *also* held that the divorce decree in this case contains no indemnification provision. Pet. 32. Indeed, that is one reason this case is such a *good* vehicle. *Id.*

judgment of divorce," and that Mallard was accordingly "liable to Burkart" for *"the difference between what Burkart would have received had Mallard not gone on disability and what she actually had received."* 95 So. 3d at 1268 (emphasis added). Again, that is *identical* to the order in this case, Pet. App. 4a, yet the court reached the precise opposite conclusion on Mallard's federal preemption argument.

3. *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000). The divorce decree of Hellene and Edwin Billeck awarded Edwin's MRP to Hellene. Pet. 20-21. After Edwin waived a portion of his MRP to receive disability benefits, Hellene sought to modify the decree to receive the same monthly payments she was previously getting. *Id.* The trial court granted Hellene's request, and the Alabama Supreme Court reversed. Rejecting Hellene's reliance on "other state courts" which had "circumvented the mandates of the *Mansell* decision," it held that *Mansell* "specifically limits the state courts" from issuing such an order, and the order therefore "violate[s] federal law." 777 So. 2d at 108-09.

According to Respondent, "*Billeck* took no position on whether a spouse has a vested interest in pre-waived MRP, or on the use of indemnification orders." BIO 11. As previously explained, however, Respondent cannot explain away the conflict by pointing to the Arizona Supreme Court's state-law "vested rights" analysis. *Supra*, at 4. And *Billeck* plainly did reject "indemnification orders." The trial judge's order required Edwin to pay Hellene the sum of money she originally was obtaining under the decree, precisely like the trial judge's order here. The

Alabama Supreme Court held that this order was preempted: "The state courts have reasoned that, as long as the trial court does not order the husband directly to pay his veteran's disability benefits to the wife, the trial court does not violate § 1408. This reasoning is flawed. ... [T]he trial court essentially is awarding the wife a portion of those veteran's disability benefits; and in doing so the trial court is violating federal law." 777 So. 2d at 108-09. The reasoning that the Alabama Supreme Court characterized as "flawed" was precisely the reasoning applied by the decision below. Pet. App. 7a (holding that divorce court's order was not preempted because it "did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay").

4. *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992). The divorce decree of Dorothy and James Clauson specified that Dorothy would receive a fixed portion of James's MRP. Pet. 21-23. After James waived his MRP to receive disability benefits, Dorothy sought to modify the decree to receive the same monthly payments she was previously getting. *Id.* The trial court granted Dorothy's request, and the Alaska Supreme Court reversed. It explained that *Mansell* "unequivocal[ly]" bars state courts from "equitably divid[ing] veterans' disability benefits received in place of waived retirement pay." 831 P.2d at 1262. And it held that although divorce courts may generally take account of changed circumstances after a veteran becomes disabled, the order under review sought to "regain the status quo as if the *Mansell* decision did not

exist," and its "effect ... was to divide retirement benefits that have been waived to receive disability benefits in direct contravention of the holding in *Mansell*." *Id.* at 1264.

Respondent attributes the result in *Clauson* to the "unique procedural setting," BIO 13, but does not establish any "unique" aspect of the "procedural setting" that would distinguish *Clauson* from this case. Respondent also asserts that "*Clauson* does not take a side on the pertinent issues," such as the permissibility of a "'make up' order." *Id.* This is just not true. The order in *Clauson* "simply replaced direct federal garnishment of James' retirement benefits with a state order to pay," 831 P.2d at 1264, which is an exact characterization of the order in this case. *Clauson*'s holding that this order violated federal law directly conflicts with the decision below.

5. *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997). The divorce decree of Kathleen and Kenneth Kramer specified that Kathleen would receive a fixed portion of Kenneth's MRP. Pet. 23-25. The divorce decree was entered in 1991; Kenneth was declared disabled in 1994 and waived his MRP to receive disability payments, retroactive back to 1992. *Id.*

For the period between 1992 and 1994, Kathleen argued she was entitled to receive the amounts specified in the 1991 decree; Kenneth argued that this would violate federal law. The court agreed with Kenneth and ordered Kathleen to reimburse him, holding that "[t]o permit her to retain this overpayment would have the effect of awarding her a percentage of the husband's disability benefits, which is

prohibited by [the USFSPA]." 567 N.W.2d at 110. For the period after 1994, the court explicitly adopted *Clauson*'s legal standard, including its prohibition on "redistribution" in response to a post-divorce conversion to disability compensation. *Id.* at 111.

Respondent simply asserts, without explanation, that *Kramer*'s holdings did not create a conflict. BIO 13, 14. To the contrary, as the Petition explains, the conflict with the decision below is obvious. Pet. 23-25. For the 1992-94 period, the court held that under *Mansell*, when a veteran converts money from MRP to disability compensation, federal law *requires* his ex-spouse's MRP payments to decrease. This is the opposite of the decision below. And for the period after 1994, the court explicitly adopted the *Clauson* standard, which also directly conflicts with the decision below. *Supra*, at 7-8.

* * *

In short, as courts have repeatedly acknowledged, there is a conflict of authority on the application of the USFSPA to the circumstances of this case. Respondent offers no intelligible theory on how the conflicting cases can be reconciled.

Respondent notably does not dispute Petitioner's contention that the issue presented here is recurring and important. Pet. 27-29. Nor does she dispute that this case is a uniquely strong vehicle. Pet. 29-33. This case therefore meets all of this Court's criteria for granting certiorari.

II. The Decision Below Is Wrong.

The decision below is directly contrary to *Mansell*. Respondent apparently concedes the central premise of the Petition: the order approved by the court below is economically identical to the order that this Court held was preempted in *Mansell*. Pet. 33-34. Respondent instead focuses on the form rather than the substance of the order: she argues that the order is not preempted because it is not directed *directly* at Petitioner's disability payment, but instead orders Petitioner to pay an *equivalent amount*. BIO 14-16. Yet as the Petition explained, this Court has squarely rejected this precise theory. Pet. 36 (discussing *Wissner v. Wissner*, 338 U.S. 655 (1950)). Respondent does not cite, much less distinguish, *Wissner*.

Respondent relies on *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (BIO 17), but *Hillman* strongly supports Petitioner's position. In *Hillman*, a federal statute directed that a federal employee's life insurance proceeds be directed to his named beneficiary; a Virginia statute provided that if the employee's marital status had changed, but he did not update his beneficiary designation, the employee's surviving spouse could sue the named beneficiary for the proceeds. *Id.* at 1947. The Court unanimously held that the Virginia statute was preempted. The Court found that the Virginia statute "conflicts with Congress' purposes and objectives," because Congress had directed that the named beneficiary receive the money, and that money therefore "cannot be allocated to another person by operation of state law." *Id.* at 1950, 1953. The same reasoning applies here. Under

Mansell, federal law requires that a divorced veteran retain his disability benefits; that sum of money cannot be redirected to his ex-spouse by operation of state law.

Respondent also cites the Arizona Supreme Court's holding that she possessed "vested right[s]" under state law. BIO 16. But she does not grapple with Petitioner's argument that a state cannot evade federal law by creating a "vested right" to an asset that federal law prohibits states from dividing. Pet. 34.

Equally unpersuasive is Respondent's assertion that the USFSPA "does not preempt agreements between spouses to divide military retirement pay," and that the decision below vindicates "freedom to contract." BIO 17-18. As the court below expressly stated, the divorce court's order did *not* enforce the original agreed-upon terms of the decree; rather, it *modified* the decree. Pet. 32. A court does not uphold the "freedom to contract" by unilaterally modifying the terms of a contract.[2]

Respondent's gestures toward the federal Due Process Clause, BIO 1, 16, 20, do not amount to a

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[2] Respondent attempts to get some mileage from Petitioner's acknowledgment that Respondent has a vested interest in his *MRP*. BIO 16. But Petitioner has always paid—and continues to pay—the amount of MRP required by the decree. Petitioner certainly has never conceded that Respondent has a vested interest to receive an *additional* payment corresponding to *waived* MRP, which are the payments at issue in this case. Pet. App. 11a (explaining the parties' positions). In any event, the Arizona Supreme Court's "vested rights" analysis was directed only to Petitioner's state-law argument, not his federal preemption argument.

persuasive argument. Respondent cites no case law, and offers no coherent explanation, supporting her theory that enforcing the original agreed-upon terms of the decree would violate the federal Constitution. Neither the Arizona Supreme Court,[3] nor any other court to have addressed this issue, has ever suggested that the application of the USFSPA would violate Due Process. At any rate, Respondent's ill-explained due process argument is no basis for denying certiorari.

Finally, Respondent's contorted argument regarding the USFSPA's savings clause (BIO 18-20) should be rejected. As the Court made clear in *Mansell*, that provision serves the purpose of preserving state courts' power to divide non-disability pay; it does not preserve state courts' power to divide property that is the economic equivalent of disability pay. 490 U.S. at 590. Tellingly, Respondent cites the dissenting opinion's interpretation of the savings clause (BIO 20), which did not persuade the majority of the Court.

CONCLUSION

The petition for writ of certiorari should be granted.

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[3] The Arizona Supreme Court did conduct a *state* due process analysis in addressing Petitioner's state-law claims, Pet. App. 13a-14a, but did not suggest that Petitioner's federal preemption argument might present any federal due process question.

Respectfully submitted,

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